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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KIRBY SPENCER,)	CASE NO. 2:14-cv-01136-RFB-(PAL)
)	
Plaintiff,)	AT&T DIGITAL LIFE, INC.'S OPPOSITION
)	TO PLAINTIFF'S MOTION FOR LEAVE TO
v.)	FILE A SURREPLY
)	
AT&T DIGITAL LIFE, INC., a foreign)	
corporation doing business in Nevada,)	
)	
Defendant.)	
)	

1 Briefing on AT&T Digital Life's ("AT&T's") pending Motion for Summary Judgment
 2 was completed over a month and a half ago, on July 17, 2015. Now, a month and a half after the
 3 completion of briefing, Plaintiff Kirby Spencer seeks to get the last word concerning a recent
 4 2015 FCC Order discussed in AT&T's Reply Brief. Contrary to Mr. Spencer's proposed
 5 surreply, however, that order confirmed that the TCPA's definition of an "ATDS" (or
 6 "autodialer") turns on a system's capacity to generate random or sequential numbers to be called.
 7 In any event, as set forth below, Mr. Spencer's request for leave to file a surreply is untimely,
 8 procedurally improper, and should be denied.

9 First, given that the Local Rules only permit three weeks for an opposition brief and two
 10 weeks for a reply (Local Rule 7-2(e)), there is no justification for Mr. Spencer's six-week delay in
 11 seeking leave to file a surreply. In *Arakelian*, for example, the court refused to allow a plaintiff to
 12 file a surreply to a motion for summary judgment because he had delayed three weeks after the
 13 defendant filed its reply brief—twice as much time as Mr. Spencer has taken here. *Arakelian v.*
 14 *Nat'l W. Life Ins. Co.*, 126 F.R.D. 1, 3 (D.D.C. 1989). Indeed, in the only case that Mr. Spencer
 15 cites in support of filing a surreply, a *pro se* plaintiff filed her surreply within two weeks over the
 16 Christmas and New Year holidays. *See Saintal v. Foster*, Case No. 2:11-cv-00445 (D. Nev. filed
 17 March 24, 2011) (Doc. Nos. 69-70.) If a *pro se* plaintiff can timely file a surreply during the
 18 holidays, there is no reason that Mr. Spencer—who is represented by two law firms—should not
 19 be required to timely file his surreply here.

20 Second, surreplies may be permitted only by leave of the court, and they are "highly
 21 disfavored," as they typically constitute a party's improper attempt to have the last word on an
 22 issue. *John Bordynuik, Inc. v. JBI, Inc.*, 2015 WL 153439 at *4 (D. Nev. Jan. 13, 2015). Here,
 23 however, rather than await prior approval from the Court, or approval concerning page length,
 24 content or timing of the surreply, Mr. Spencer has effectively filed the surreply without prior
 25 leave by attaching it to his motion. *See e.g. Spina v. Maricopa County Dep't. of Transp.*, 2009
 26 WL 890997 at *1 (D. Ariz. April 1, 2009) ("By filing its Surreply and Motion to File Surreply as
 27 one document, Plaintiff has essentially filed a surreply without first obtaining leave of the Court
 28 to do so. Plaintiff's Surreply was, therefore, improper.").

1 Third, even if the Court were to grant leave to file the proposed surreply, Mr. Spencer
 2 mischaracterizes the 2015 FCC Order such that his proposed surreply should be rejected.
 3 According to Mr. Spencer, the 2015 FCC Order “reiterated” that in order for a defendant’s system
 4 to qualify as an ATDS (which is a necessary element of Mr. Spencer’s claim), it is sufficient if
 5 the equipment can dial numbers without human intervention, and thus the capacity to generate
 6 random or sequential numbers is irrelevant. (Proposed Surreply, at pp. 1-2.) And yet, Mr.
 7 Spencer ignores that that FCC plainly stated that it was “affirming the law’s definition of an
 8 [ATDS],” and that and the term “ATDS” is “defined in the [TCPA] as any technology with the
 9 capacity to dial random or sequential numbers.” (June 18, 2015 Press Release, p. 2 [Doc. No. 44-
 10 1] (emphasis added).) The 2015 FCC Order addresses the subject of what it means to have the
 11 “capacity” to generate numbers, but there would be no need to address that subject if, as Mr.
 12 Spencer contends in his opposition and proposed surreply, equipment qualifies as an autodialer
 13 regardless of whether it has that capacity. (FCC July 10, 2015 Order, at ¶¶10-24 (Doc. No. 44-
 14 1.).)

15 Fourth, the proposed surreply also should be rejected because it goes beyond simply
 16 addressing the content of the 2015 FCC Order. In this regard, Mr. Spencer attempts to distinguish
 17 the 2015 FCC Order with a lengthy rehash of his argument that Digital Life text alerts are sent
 18 “without any human involvement.” (Proposed Surreply at 2; *see also id.* at 5-6.) As shown in
 19 AT&T’s Reply Brief, however, that argument cannot support denial of AT&T’s motion for
 20 summary judgment because it contradicts the undisputed facts, which establish that Digital Life
 21 customers control which security events will prompt a text alert, who will receive them, and when
 22 the text alerts can be sent. (AT&T’s Reply Brief, at p. 10-11 (Doc. No. 43).)

23 In sum, for the foregoing reasons, AT&T respectfully submits that Mr. Spencer’s motion
 24 for leave to file a surreply should be denied.

25 Dated: September 1, 2015

_____/s/ Joel D. Smith

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CERTIFICATE OF SERVICE

I, Joel D. Smith, state:

My business address is 275 Battery Street, 23rd Floor, San Francisco, California 94111. I am over the age of eighteen years and not a party to this action.

On the date set forth below, I served via electronic service the foregoing document(s) described as:

**AT&T DIGITAL LIFE, INC.'S OPPOSITION TO PLAINTIFF'S MOTION
FOR LEAVE TO FILE A SURREPLY**

on the following person(s) in this action:

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DATED: September 1, 2015 BY: /s/ Joel D. Smith

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